STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 30, 2002
v	No. 225783 Oakland Circuit Court
DANIEL LEE CALKINS, Defendant-Appellant.	LC Nos. 1999-165311-FC; 1999-165312-FC; 1999-165313-FC; 1999-165314-FC

Before: Cooper, P.J., Cavanagh and Markey, JJ.

PER CURIAM.

Defendant was convicted of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) [sexual penetration with a person under thirteen years of age], and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a) [sexual contact with a person under thirteen years of age]. Defendant was sentenced to fifteen to twenty-five years' imprisonment for each first–degree criminal sexual conduct conviction and eight to fifteen years' imprisonment for the second-degree criminal sexual conduct conviction. Defendant appeals by right. We affirm.

This case involves defendant's sexual abuse of his granddaughter during overnight visits at defendant's house. During the overnight visits, the victim slept in her grandparents' bed in between her grandparents. During this time, defendant would digitally penetrate his granddaughter's vagina and force her to touch his penis. The victim was also being sexually abused by Daniel Jr., the victim's stepfather and defendant's son. The victim told her mother that defendant and Daniel Jr. were sexually abusing her after she read a newspaper article dealing with the sexual abuse of other children. At trial, defendant argued that the victim had a "dissociative reaction" to the sexual abuse Daniel Jr. committed and blamed defendant for the abuse actually committed by Daniel Jr.

At trial, the prosecution admitted evidence of a prior uncharged act under MRE 404(b). Specifically, Daniel Jr. testified that he observed defendant naked and in bed with his sister, defendant's daughter, several years earlier. Defendant now argues that the trial court abused its discretion when it admitted this evidence. We disagree. We review the trial court's decision on the admission of evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

MRE 404(b)(1) deals with the admissibility of other crimes, wrongs, or acts and provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

"Relevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Therefore, in order for other act evidence to be admissible under MRE 404(b), we must conclude:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury. [*People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998), quoting *VanderVliet, supra* at 55.]

Defendant urges us to conclude that the prosecutor did not demonstrate a proper purpose. "MRE 404(b)(1) . . . is a rule of inclusion that contains a nonexclusive list of 'noncharacter' grounds on which evidence may be admitted. This rule permits the admission of evidence on any ground that does not risk impermissible inferences of character to conduct." *Starr, supra* at 496. Mechanical recitation of 'knowledge, intent, absence of mistake, etc., without explaining how the evidence relates to the recited purposes, is insufficient to justify admission under MRE 404(b)." *Crawford, supra* at 387.

In this case, the prosecutor argued that the testimony of Daniel Jr. was admissible to explain why the victim did not tell her grandmother, Nancy, about the abuse by defendant. The prosecutor explained that Nancy did nothing when she became aware of the fact that defendant was having a sexual relationship with their daughter. The trial court agreed with the prosecutor, stating:

> I think that it only makes sense that the prosecution should be able to show by the prior acts that the mother was told, I guess would be the grandmother was told, the grandmother was told of this behavior and did nothing about it. I agree that the jury will have in their mind the question how truthful is the victim, why didn't the mother observe something and would perhaps use that then to the detriment of the victim in this case, so I think that the best way to be cautious on it though is to accept the prosecutor's second theory which is both of them were found nude together, that the grandmother knew about it, that's Nancy, and did not do anything about it, didn't report it, so I'll grant the request.

While this could be a proper purpose for admitting MRE 404(b) evidence, it was not here. Although the prosecutor agreed that he was moving to admit the evidence to show that the grandmother did nothing about the earlier incident, that reason does not appear to apply. The victim did not know about defendant's abuse of his daughter, which occurred several years earlier. There was also no evidence that the victim knew her grandmother did nothing when she learned of the incident involving her daughter. Therefore, we do not agree that this testimony was admissible for the purpose of explaining why the victim did not tell her grandmother about the abuse.

The prosecutor also argues that this evidence was admissible to rebut defendant's argument that the victim had a dissociative reaction to the sexual abuse committed by Daniel Jr. and was blaming defendant for the actions of Daniel Jr. However, the trial court disagreed that this was a proper purpose stating:

> The evidence is inadmissible as applied to the second theory. Plaintiff contends that it shows intent, lack of mistake by the victim and absence of accident by Defendant. Rather, it amounts to nothing more than a showing of criminal propensity, an impermissible use because it relies on the inference that because he did it to his daughter, he must have done it to his step grand-daughter.

We agree with the trial court that admitting this evidence for the purpose of rebutting defendant's accusation that the victim had a dissociative reaction requires the jury to infer that defendant committed the sexual abuse because he had in the past. This is nothing but propensity evidence and is improper. We also agree with the trial court's conclusion that the evidence could not be admitted to demonstrate defendant's intent, lack of mistake by the victim, and absence of accident by the defendant.

This evidence cannot be admitted to demonstrate defendant's motive or intent. As our Supreme Court recognized in *People v Sabin (After Remand)*, 463 Mich 43, 68; 614 NW2d 888 (2000), this evidence is impermissible to demonstrate that defendant's motive was to have sex with young girls related to him. Likewise, the evidence cannot be admitted to demonstrate defendant's intent because criminal sexual conduct is a general intent crime. *Id.* Moreover, this evidence cannot be admitted to demonstrate the absence of mistake on the part of the victim. In this case, like in *Sabin.*

> defendant's theory of defense was not that the complainant mistakenly perceived his actions, but that the entire incident did not take place. We therefore conclude that the evidence was not relevant under a theory of absence of mistake. [*Id*. at 69.]

This evidence also cannot be admitted to bolster the victim's credibility. As our Supreme Court explained, "evidence of uncharged acts of sexual misconduct perpetrated by the defendant on the complainant" can be admitted to corroborate the complainant's testimony. *Id.* at 69-70. However, "evidence of sexual acts between the defendant and persons other than the complainant is not relevant to bolster the complainant's credibility because the acts are not part of the principal transaction." *Id.* at 70.

However, this evidence was admissible for the proper purpose of demonstrating a common scheme, plan, or system by defendant. In *Sabin, supra* at 47, the defendant was accused of sexually abusing his thirteen-year-old daughter. The prosecution sought to admit evidence that the defendant had also sexually assaulted his stepdaughter. *Id.* at 47-48. In discussing whether the evidence was admissible to demonstrate a common scheme, plan, or system, our Supreme Court stated:

> In this case, we conclude that the trial court did not abuse its discretion in determining that defendant's alleged assault of the complainant and alleged abuse of his stepdaughter shared sufficient common features to infer a plan, scheme, or system to do the acts. The charged and uncharged acts contained common features beyond mere commission of acts of sexual abuse. Defendant and the alleged victims had a father-daughter relationship. The victims were of similar age at the time of the abuse. Defendant allegedly played on his daughters' fear of breaking up the family to silence them. One could infer from these common features that defendant had a system that involved taking advantage of the parent-child relationship, particularly his control over his daughters, to perpetrate abuse.
>
> We acknowledge that the uncharged and charged acts were dissimilar in many respects. Defendant's stepdaughter testified that, over the course of seven or eight years beginning when she was in kindergarten, defendant performed oral sex on her three to seven times weekly. The abuse took place at night in her bedroom. She recalled one incident when she was in the fifth grade during which defendant had her lay on her side and he placed his penis between her legs. The charged act in this case, in contrast, was the only time defendant assaulted the complainant. The complainant did not allege prolonged sexual abuse. The incident occurred during a weekday afternoon, not at night while the complainant slept. The sexual act was intercourse, not oral sex. On the basis of this evidence, one could infer that the uncharged and charged acts involved different modes of acting, both in terms of sexual acts and the manner in which defendant allegedly perpetrated the abuse.
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> This case thus is one in which reasonable persons could disagree on whether the charged and uncharged acts contained sufficient common features to infer the existence of a common system used by defendant in committing the acts. As we have often observed, the trial court's decision on a close evidentiary question such as this one ordinarily cannot be an abuse of discretion. We therefore conclude that the trial court did not abuse its discretion in determining, under the circumstances of this case, that the evidence was admissible under this theory of logical relevance. [*Id*. at 66-68; citations omitted.]

In this case, we conclude that the charged crime and uncharged bad act are also sufficiently similar. Defendant used his home to sexually abuse young female relatives. In the charged crime, defendant was accused of sexually abusing his eight-year-old granddaughter on three occasions while she slept in her grandparents' bed. The sexual abuse involved digital penetration as well as requiring the victim to touch defendant's penis. Similarly, the uncharged act involved an occasion where defendant was found naked and, again, in his own bed with his fifteen- or sixteen-year-old daughter. Thus, because there was a proper purpose for admitting

evidence of this prior bad act by defendant, its admission under MRE 404(b) was not an abuse of discretion.

Moreover, even were we to conclude that the admission of this evidence was erroneous, its admission was harmless error. The trial court gave limiting instructions to the jury[1] that clearly set forth how the jury was to consider the testimony. Juries are presumed to have followed their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). After reviewing the entire record in this case, we are not convinced that it is "more probable than not" that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Defendant also argues that the trial court abused its discretion when it admitted the testimony of defendant's son, Daniel Jr., that, when confronted with the allegations of sexual abuse, defendant did not admit or deny the allegations.[2] "A party opposing the admission of

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[1] The trial court instructed the jury:

> You have heard testimony that was introduced that shows that the defendant has engaged in an improper sexual conduct to which the defendant is not on trial. If you believe this evidence, you must be very careful and consider it for only one limited purpose, that is, to help you judge the believability of [the victim's] testimony regarding the acts for which the defendant is now on trial. You must not consider this evidence for any other purpose; for example, you must not decide that it shows the defendant is a bad person or that the defendant is likely to commit crimes. You must not convict the defendant here because you think he's guilty of other bad conduct.
>
> You've her [sic] the testimony of Daniel Calkins, Jr., regarding an allegation of improper conduct by the defendant on a past occasion. For reasons with which you should not concern yourselves, I instruct you that you're not to consider that portion of his testimony for any issue pertaining to defendant's guilt or innocence of the current charge.

[2] In this case, the testimony of Daniel Jr. was as follows:

> Q: And you did confront him in his house once?
>
> A: Right, yeah, okay, once, yes.
>
> Q: And when you confronted him at his house, did he ever deny it?
>
> A: No.
>
> Q: Did he ever admit it?

(continued…)

evidence must timely object and specify the same ground for objection that it asserts on appeal." *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997). Here, defendant did not timely object to this testimony, so this issue is unpreserved. To avoid forfeiture of an unpreserved issue on appeal, defendant must show: (1) that an error occurred; (2) that the error was plain, i.e., clear or obvious, and; (3) that the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

> The Fifth Amendment and Const 1963, art 1, § 17 provide that no person shall be compelled to be a witness against himself in a criminal trial. The Fifth Amendment privilege has been extended beyond criminal trial proceedings "to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." [*People v Schollaert*, 194 Mich App 158, 164; 486 NW2d 312 (1992), quoting *Miranda v Arizona*, 384 US 436, 467; 86 S Ct 1602; 16 L Ed 2d 694 (1966).]

Defendant relies on *People v Bobo*, 390 Mich 355, 359-360; 212 NW2d 190 (1973), where our Supreme Court stated:

> We will not condone conduct which directly or indirectly restricts the exercise of the constitutional right to remain silent in the face of accusation. "Nonutterances" are not statements. The fact that a witness did not make a statement may be shown only to contradict his assertion that he did.
>
> * * *
>
> What concerned the parties and what prompted our grant of leave was the propriety of using the fact of defendant's silence either as evidence of guilt or for the purpose of impeachment.
>
> Whether his silence was prior to or at the time of arrest makes little difference--the defendant's Fifth Amendment right to remain silent is constant.

Defendant's reliance on *Bobo* is misplaced. As we recognized,

> *Bobo*, however, is limited to "[the] right to remain silent *in the face of accusation*" . . . . *Bobo* is not controlling in cases where the "silence" occurred before any

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(…continued)

A: No.

Q: But he didn't deny it to you?

A: No.

Q: And what did you indicate to him?

A: I told him he needs help, he needs counseling.

> police contact. [*People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992) (internal citations omitted; emphasis in original).]

Clearly, *Bobo* does not apply to the instant case because defendant was not being questioned by police.

A case more on point is *Schollaert* where we addressed whether the testimony of police officers that the defendant did not ask why he was being taken for questioning from his home at 3:30 a.m. infringed upon defendant's right to silence. *Schollaert, supra* at 160-161. In that case, we held:

> In the present case, defendant's silence or non-responsive conduct did not occur during a custodial interrogation situation, nor was it in reliance on the *Miranda* warnings. Therefore, we believe that defendant's silence, like the "silence" of the defendant in [*People v*] *McReavy*, [436 Mich 197; 462 NW2d 1 (1990)] was not a constitutionally protected silence. [*Id*. at 166.]

In reaching this result, we relied on the concurring opinion of Justice Stevens in *Jenkins v Anderson*, 447 US 231, 243-244; 100 S Ct 2124; 65 L Ed 2d 86 (1980):

> The fact that a citizen has a constitutional right to remain silent when he is questioned has no bearing on the probative significance of his silence before he has any contact with the police…. When a citizen is under no official compulsion whatever, either to speak or remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment. For in determining whether the privilege is applicable, the question is whether petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent. A different view ignores the clear words of the Fifth Amendment. [*Id*. at 164-165.]

We do not agree with defendant that his right to remain silent was violated by the testimony of Daniel Jr. The conversation between Daniel Jr. and defendant did not occur in the presence of police officers or at the prompting of the police. In fact, the conversation occurred at defendant's home before defendant had been arrested or even charged with a crime. See *People v Bushard*, 444 Mich 384, 389-390 (Boyle, J.), 398 (Levin J.); 508 NW2d 745 (1993) (the defendant's non-verbal communication to cellmate when asked if the defendant knew she had admitted guilt was admissible and did not infringe on the defendant's right to remain silent). Thus, the evidence was properly admitted, and defendant has not demonstrated error.

Finally, defendant argues that the cumulative effect of the prosecutorial misconduct committed during the trial denied him a fair trial. We disagree. We review de novo allegations of prosecutorial misconduct. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). "Issues of prosecutorial misconduct are decided case by case, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context. The test is whether defendant was denied a fair trial." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999) (citations omitted).

Defendant first argues that the prosecutor misrepresented the content of Daniel Jr.'s testimony concerning the incident involving defendant and his daughter. Defendant argues that the prosecutor knew that Daniel Jr. would testify that defendant was removed from the home for a short time when Nancy became aware of the incident. Therefore, defendant argues that the prosecutor misrepresented the content of that testimony solely to ensure its admission under MRE 404(b), and is thus guilty of prosecutorial misconduct.

We are unable to discern from the record that the prosecutor intentionally misrepresented the testimony of Daniel Jr. to the court. Certainly, if that were the case, we would condemn the actions of the prosecutor. However, on the record before us, we cannot conclude that the prosecutor committed misconduct by admitting evidence under MRE 404(b) that was deemed admissible by the trial court.

Defendant also argues that the prosecutor during closing argument improperly stated: "I want to remind you that the defendant was confronted by his own son and never denied this to him, never denied it." Essentially, defendant argues that the prosecutor improperly commented on defendant's exercise of his right to remain silent. Again, we disagree. We have already explained that the prosecutor could introduce testimony that defendant did not admit or deny the incident when confronted by Daniel Jr. Therefore, the prosecutor's commenting on the evidence presented at trial during closing argument was not misconduct. Indeed, a prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Defendant also argues that the prosecutor impermissibly appealed to the jury to sympathize with the victim by stating during closing argument:

> This defendant put his fingers, his 50, 60-plus-year-old fingers into her nine-year-old vagina between one and 10 times and he also forced her to touch him. Like you to imagine poor [victim] at her first slumber party when girls are talking about their first sexual relationship or their first kiss. What is [the victim] going to think about? Not some other 12-year-old boy who tried to kiss her at school. Her first sexual experience was with him, her grandfather.

Defendant is correct that a prosecutor should not appeal to the jury to sympathize with the victim. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). However, we are not convinced that this amounted to misconduct. While we would caution prosecutors against making such statements at trial, we note that the complained-of argument was one isolated statement. We are also mindful of the fact that the prosecutor did not ask jurors to suspend their judgment or decide the case on anything other than the evidence. Moreover, even were we to find this argument to be misconduct, we would not require reversal. The trial court instructed the jury that "[y]ou must not let sympathy or prejudice influence your decision." The jury was also

instructed that arguments of lawyers are not evidence, and jurors are presumed to have followed the instructions. *Graves, supra* at 486.

We affirm.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ Jane E. Markey